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December 5, 2003

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Third Administrative Review
of Stainless Steel Sheet and Strip in Coils from France: July 1, 2001
through June 30, 2002

SUMMARY:

We have analyzed the comments and rebuttal comments of interested parties in the third administrative review of the antidumping duty order covering stainless steel sheet and strip in coils from France. As a result of our analysis, we have made changes, including corrections of certain inadvertent programming errors in the margin calculation. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments by interested parties:

GENERAL COMMENTS:

1. **Date of Sale**
2. **U.S. Sales Database**
3. **Affiliated Freight-Forwarder Expenses**
4. **U.S. Inventory Carrying Costs**
5. **Home Market Credit Expenses**
6. **Home Market Inland Freight Expenses**
7. **Home Market Rebate**
8. **Affiliated Inland Freight Carrier Expenses**
9. **Ugine France Service Commissions**

10. Indirect Selling Expenses
11. Gross-to-Net Adjustment
12. Constructed Export Price Offset
13. Negative Dumping Margins
14. Home Market Warranty Expenses
15. Interest Expenses
16. Commission Expenses in Arm's-Length Test
17. Home Market Commissions

BACKGROUND:

On August 7, 2003, the Department of Commerce ("Department") published the preliminary results of the administrative review of the antidumping duty order on stainless steel sheet and strip in coils from France. See Preliminary Results of Antidumping Administrative Review: Stainless Steel Sheet and Strip in Coils from France ("Preliminary Results") 68 FR 47409 (August 7, 2003). The merchandise covered by the order is stainless steel sheet and strip in coils ("SSSS") as described in the "Scope of the Review" section of the Federal Register notice. The period of review ("POR") is July 1, 2001, through June 30, 2002. In accordance with 19 C.F.R. 351.309(c)(ii), we invited parties to comment on our Preliminary Results. On September 8, 2003, Ugine¹ and the Petitioners² filed comments. On September 15, 2003, Ugine and the Petitioners filed rebuttal comments.

DISCUSSION OF THE ISSUES:

18. Date of Sale

Petitioners contend that: (1) the date of order is the appropriate date of sale for Ugine's U.S. constructed export price ("CEP") sales; (2) Ugine's analysis of changes between date of order and date of invoice is based on the wrong data; (3) Ugine has reported unreliable and incorrect dates of sale; and (4) application of adverse facts available to Ugine's CEP sales is therefore warranted.

¹ Ugine, in the instant review, refers to Ugine, S.A. and Imphy Ugine Precision ("IUP") as a single entity as they were treated by Ugine prior to submitting its antidumping duty questionnaire response. We note that Ugine and IUP were also treated as a collective entity during the first and second administrative review. See Notice of Final Results of the Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from France and accompanying Issues and Decision Memorandum ("SSSS from France, First Review Final") 67 FR 6493 (February 12, 2001) at Comment 1.

² The Petitioners in this case are Allegheny Ludlum Corporation, AK Steel, Inc., North American Stainless, United Steelworkers of America, AFL-CIO/CLC, Butler Armco Independent Union and Zanesville Armco Independent Organization.

First, Petitioners allege that the record demonstrates that the date of purchase order is the most appropriate date of sale. Petitioners note that the Department's regulations allow the Department to use a date of sale other than the date of invoice "if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." See 19 C.F.R. 351.401(i). Petitioners argue that Ugine, in its initial Section A response, reported the date of invoice as the date of sale for its home and U.S. markets because the invoice date best reflects the date on which the material terms of sale (e.g., price and quantity) are finally established, without any support or documentation. Petitioners explain that Ugine stated that home and U.S. sales are made pursuant to a purchase order that is subsequently acknowledged by Ugine when the customer's order is accepted by Ugine. Petitioners contend that the terms of sale are thus set by the order/acknowledgment. Petitioners argue that if changes to the terms of sale are made by either the customer or Ugine, Ugine states that it will issue a revised order acknowledgment. Petitioners contend that without significant changes in material terms of sale between the order date and invoice date, order date should have been reported as the appropriate date of sale.

Second, Petitioners argue that Ugine based its claim of significant changes in the material terms of sale on changes that occurred for sales between two related parties, Ugine and Usinor Stainless USA. Petitioners contend that the Department did not learn of the incorrect basis of the analysis until verification. Petitioners allege that a comparison of changes in the terms of sale between affiliated parties is not the type of analysis that the Department accepts to demonstrate changes in the terms of sale to the first unaffiliated customer. Petitioners argue that, according to the Department's regulations at 19 C.F.R. 351.402(a), the Department may not base its margin calculation on U.S. sales information between affiliated parties, because those prices and terms are not the result of arm's-length negotiations. Petitioners argue that intra-company pricing decisions may be made based on a variety of factors including: to shift profits; to account for tax considerations; to meet cash flow needs; or to absorb antidumping duties. Petitioners explain that adjustments may be made to price or other sales terms between the related companies, Usinor Stainless USA and Ugine, for any number of reasons without changing the underlying transaction between Usinor Stainless USA and the first unaffiliated customer. Furthermore, Petitioners contend that an examination of the related party transactions gave no indication of whether the terms of sale to the first unaffiliated customer changed. Therefore, Petitioners contend that the Department cannot determine the date of sale based on sales data for the intra-company transaction that preceded the sale to the unaffiliated purchaser.

Third, Petitioners argue that Ugine failed to report the actual order date for date of sale, and instead reported the last date that a copy of the order was printed as the order date. Petitioners argue that there is no apparent connection between the date the order is last printed from the system and the actual order date, which an examination of the verification documents shows is reflected in invoices, release instructions, etc. Petitioners allege that for a large number of the 14 sales examined by the

Department, the date of order was either incorrectly reported or unsubstantiated.³ Thus, Petitioners contend that because Uginé has not reported the actual order or change-order date for its U.S. sales, Uginé has prevented the Department from being able to perform its dumping analysis on the proper sales.

Petitioners also argue that the Department's notations of "no discrepancies" when it verified the U.S. sales database does not constitute approval of the methodology chosen by Uginé. Petitioners note that the Department noted "no discrepancies" when reviewing the order date reported was actually the order print date, but that this notation signified confirmation of what was done and not approval of the methodology. Petitioners contend that Uginé could have reported order date because the information was included in verification documents.

Therefore, Petitioners contend that Uginé's U.S. sales database is completely unreliable as a basis for calculating margins because Uginé relied on the day the order was most recently printed from its computer system rather than the actual date of order acknowledgment. Petitioners also contend that Uginé failed to inform the Department it had relied on this methodology for reporting date of order, and was only discovered at verification. Moreover, Petitioners argue that Uginé's misreporting of the U.S. date of order affects all aspects of the Department's dumping analysis. Petitioners argue that the Department likely does not have the proper pool of sales. Petitioners explain that, based on their examination of the sales transactions reviewed at verification, Uginé likely failed to report certain orders that should have properly been included in the U.S. sales database and incorrectly included other orders that should not have been reported to the Department, because of the actual date of sale.

Petitioners also contend that the Department does not have the proper total U.S. sales for the period of review and cannot properly complete its model match program for determining the dumping margin. Petitioners explain that since Uginé reported the wrong date of sale for the U.S. sales it has reported, these sales cannot be properly matched to the month/year combination for comparison to normal value. Petitioners contend that the Department cannot determine the proper exchange rate to use when comparing U.S. sales to normal value. Petitioners argue the Department cannot remedy the reporting problems created by Uginé in its U.S. sales database, because the record is closed and the accurate data concerning the actual date of sale based on date of order confirmation is not available to the Department. Petitioners contend that had Uginé fully explained its reporting methodology earlier in the proceeding, the Department could have sought a correction.

Therefore, Petitioners contend that without the proper U.S. dates of sale, the Department cannot perform an accurate dumping analysis and the dumping margin must be based on facts available. Petitioners argue that fair and accurate dumping calculations "are fundamental to {the} proper

³ Petitioners provided a chart summarizing the alleged errors in reporting date of sale. See Petitioners' September 8, 2003, case brief, at 14.

administration of dumping laws.” See Koyo Seiko Co., Ltd. V. United States, 14 CIT at 680, 682, 746 F. Supp. 1108, 1110 (1990) (“Koyo Seiko”). Petitioners explain that in Koyo Seiko, the Court of International Trade (“CIT”) recognized that there is a legislative preference for factually correct decisions, noting that “affirming a final determination *known to be based on incorrect data* would not only perpetuate the error, but would also be contrary to legislative intent.” See Koyo Seiko, at 1111 (emphasis in original). Petitioners also cite Rhone Poulenc, Inc. v. United States, where the Department must determine current margins as accurately as possible. See Rhone Poulenc, Inc. v. United States, 8 Fed. Cir. (T) 61, 67, 899 F.2d 1185, 1191 (1990) (“Rhone Poulenc”). See also American Silicon Technologies v. United States, 23 CIT 237, 242 (CIT 1999) (The Department is justified in departing from established practice so as to obtain the most accurate dumping margins possible).

Fourth, Petitioners contend that application of adverse facts available to Uginé’s CEP sales is warranted in this case. Petitioners explain that, according to Section 776(a) of the Act, if necessary information is not on the record or if an interested party (1) withholds information that has been requested by the Department; (2) fails to provide such information in a timely manner or in the form or manner requested; (3) significantly impedes a determination under the statute; or (4) provides such information but the information cannot be verified; the Department shall use facts otherwise available in reaching its determination in accordance with Sections 782(c) through (e) of the Act. Petitioners argue that facts available is applicable because Uginé’s U.S. sales listing is unusable. Petitioners argue that Uginé meets the first and second criteria of Section 776(a) of the Act because Uginé either deliberately withheld accurate order information or failed to provide order information in the manner requested. Petitioners contend that Uginé meets the third criteria, because Uginé significantly impeded this proceeding by: failing to provide the proper sales order date information; providing an analysis of changes in material terms of sale using the wrong sales data; and failing to disclose either to the Department until verification. Finally, Petitioners argue that Uginé meets the fourth criteria, because the Department was unable to verify the accuracy of the reported dates of sale. Petitioners contend that while Uginé was given multiple opportunities to correctly report the sales date and to provide correct order date information, Uginé chose not to do so, and chose not to explain its reporting of dates of sale until verification. Therefore, Petitioners argue that since Uginé’s sales listing based on date of order is unreliable, and for the above reasons, the Department is required to base its determination on the basis of total facts available.

Petitioners explain that if the Department finds that a respondent has failed to cooperate to the best of its ability, the Department may use an inference adverse to the respondent, according to sections 776(b) and 782(e)(4). Petitioners contend that Uginé’s actions with regard to the reporting of its date of sale constitute uncooperative behavior. Petitioners note that the record shows that the Department clearly articulated the need for an accurate reporting of the U.S. date of sale in its December 20, 2002 supplemental questionnaire, at 4; and in its request for Uginé’s U.S. sales listing based on date of order. Petitioners argue that prior to verification Uginé never claimed that it could not provide the proper analysis of the changes between the U.S. date of order and the U.S. date of invoice, or that it could not

report that actual U.S. date of order. Petitioners contend, therefore, that Ugine did not cooperate to the best of its ability in this review. Petitioners explain that in Nippon Steel, the Court states that the best of its ability standard assumes that respondents are familiar with the rules and regulations and that the respondent will:

(a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all the records it maintains in its possession, custody and control; and (c) conduct prompt, careful and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers' ability to do so. See Nippon Steel Corporation v. United States, Ct. No. 02-1266-1267, Slip Op., at 7 (August 8, 2003, Fed. Cir.) ("Nippon Steel").

Petitioners assert that the court further states that the burden is on the respondent to be fully forthcoming to the extent that its records permit and does not grant inadvertence or neglect as an excuse for failure to fully cooperate with the Department's request for information. Id. at 9. Petitioners contend that Ugine had the information on order dates requested by the Department and could have provided this information with some application of reasonable care. Petitioners also argue that Ugine failed to provide the actual order dates and failed to disclose that it had not provided the actual order dates until verification. Petitioners note that Ugine had multiple opportunities to report the correct information or to report any deviations from the Department's instructions. Thus, Petitioners argue that application of adverse facts available to Ugine's U.S. sales through Usinor Stainless USA is warranted.

Ugine argues that Petitioners arguments are wholly without merit, and the Department should continue to apply the date of sale methodology used in the Preliminary Results. Ugine contends that: (1) the date of invoice is the appropriate date of sale for Ugine's CEP sales; (2) Ugine's analysis of changes between date of order and date of invoice is relevant and correct; (3) Ugine has reported reliable dates of sale; and (4) application of adverse facts available to Ugine's CEP sales is not warranted.

First, Ugine contends that the date of sale reported by Ugine and used by the Department in the Preliminary Results is based on the appropriate date of sale methodology. Ugine explains that in this review, and in the original less-than-fair-value investigation and in the first and second reviews of this case, Ugine reported the date of sale for its U.S. sales based on the date on which the material terms of sale are established, which is the earlier of the invoice date or date of shipment. Ugine notes that according to 19 C.F.R. 351.401(i), "{i}n identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business." Ugine contends that while the regulations grant the Department the discretion to select an alternative date of sale other than invoice date when appropriate, the regulations clearly establish a presumption that the invoice date will be the date of sale in most situations. See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27349 (May 19, 1997) ("preamble to the regulations"). Ugine argues that the material terms of sale are not

fixed until the merchandise is actually shipped, because of evidence that the order prices and quantities may be, and frequently are, modified between the date of the initial order and the date of shipment. Uguine cites to SeAH Steel Corp., where the Court stated that “[t]he Department may exercise its discretion to rely on a date other than invoice date for the date of sale only if ‘material terms’ are not subject to change between the proposed date and the invoice date, or the agency provides a rational explanation to why the alternative date ‘better reflects’ the date when ‘material terms’ are established.” See SeAH Steel Corp. Ltd. v. United States, 2001 WL 180259, at 2 (CIT 2001) (“SeAH Steel Corp.”). See also Thai Pineapple Canning Indus. Corp., Ltd. v. United States, No. 98-03-00487, 2000 WL 174986, at 2 (CIT 2000). Therefore, Uguine contends that the date that best reflects the date on which the exporter or producer establishes the material terms of sale is the invoice date.

Uguine notes that the Department determined that this date of sale methodology is proper for Uguine’s U.S. sales in the original less-than-fair-value investigation and in the first and second reviews of this case. Uguine asserts that in the previous review of this case, the Department rejected the same argument on date of sale made by Petitioners.⁴ Uguine argues that Petitioners have cited no change in Uguine’s sales process or practices to justify departing from the law of the case and the Department’s established practice. Uguine contends that the Department verified that there were significant changes between order date and invoice date for U.S. sales in this review. See Home Market Verification Report, at 17.

Second, Uguine alleges that Petitioners’ assertions that Uguine’s analysis of changes is not a legally permissible or factually relevant analysis for determining date of sale are without legal or factual merit. Uguine contends that the statute and regulations permit the Department to examine the record evidence, and the record evidence clearly demonstrates that the date of sale methodology applied in the Preliminary Results was correct. Uguine argues that 19 C.F.R. 351.402(a) and section 776(a) are concerned with the starting price for the Department’s calculations, with which Uguine has fully complied. Uguine contends that these provisions do not preclude the Department from examining information related to intra-company transactions if the information is relevant to its determination, such as date of sale. Uguine argues that by not reviewing such information would be contrary to the Department’s obligation to perform its calculations as accurately as possible. See Viraj Group Ltd. v. United States, 162 F. Supp. 2d 656, 662-3 (CIT 2001). Uguine contends that the analysis provided by

⁴ See Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France, 67 FR 78773 (December 26, 2002) (“France SSSS, 2nd Review”) and accompanying Issues and Decision Memorandum, at Comment 19 (where the Department stated that “[w]ith respect to the Petitioners’ argument that the Department should have used the date of order acknowledgment and not the date of invoice as the date of sale, we disagree.... {B}ecause we verified that Uguine experienced some significant changes in the base price between the date of order acknowledgment and date of invoice, we continue to use the date of invoice as the date of sale.”).

Ugine demonstrates that there were a significant number of changes in the material terms of the sales made to the unaffiliated customers, and is therefore, relevant to the Department's date of sale inquiry.

Ugine also argues that the sales process between Ugine and Usinor Stainless USA is linked to Usinor Stainless USA's sales process with the first unaffiliated customer. Ugine explains that Usinor Stainless USA receives and responds to customer inquiries and enters the customer's order directly into Ugine's computer system. Ugine states that Usinor Stainless USA does not agree to provide the ordered merchandise or acknowledge the customer's order until Ugine approves the order. Ugine contends that the back-to-back nature of the sales process used by Usinor Stainless USA and Ugine was verified by the Department. Moreover, Ugine argues that any modifications reflected in Ugine's sales documentation and sales data must accurately reflect modifications to Usinor Stainless USA's customer order, because modifications follow this same sales process and must be approved by the mill. Therefore, Ugine argues that the Department should continue to apply the date of sale methodology used in the Preliminary Results.

Third, Ugine argues that the order date U.S. sales listing provided by Ugine is accurate and reliable. Ugine also notes that the Department did not rely on the order date U.S. sales listing in the Preliminary Results. Ugine alleges that Petitioners failed to recognize the varying sales processes for different types of sales when they argued that Ugine incorrectly reported the order date for several of the verified U.S. sales. Ugine explains that it made five types of sales: (1) Hague spot sales; (2) Hague periodic sales; (3) Hague blanket orders; (4) Usinor Stainless USA inventory sales; and (5) Usinor Stainless USA direct sales. Ugine states that for Hague spot sales the date of order is the date the customer inquiries are entered into the computer system, which is roughly within 24 hours of accepting the order. Ugine argues that there is no discrepancy in the reported date of sale for these sales as alleged by Petitioners. Next, Ugine states that for Hague periodic sales the date of order is the date of the customer's order, which Ugine reported after manually reviewing the order document. Ugine argues that there is no discrepancy in the reported date of sale for these sales as alleged by Petitioners. Ugine then explains that for Hague blanket order sales no order date was reported because these blanket orders reflect a price agreement, but no agreement as to quantity. Ugine contends that Petitioners' alleged discrepancy for preselected sale #7 relies on the use of the date of the blanket order as the date of the sale and amounts to a nine-day difference between the release instruction issued by the customer and the date of the shipment. Next, Ugine states that for Usinor Stainless USA inventory sales, these sales generally have no written customer order because shipment and invoicing occur shortly after a customer order is entered in the system. Ugine explains that it reported the date the order was entered into Usinor Stainless USA's computer system as the date of sale, and therefore, there is no discrepancy in the reported date of sale as alleged by Petitioners. Finally, Ugine states that for Usinor Stainless USA direct sales, the merchandise is shipped directly from Ugine's mill to the customer. Ugine explains that Usinor USA receives written customer orders for these sales, but does not acknowledge the order until the mill has approved the sales terms. Ugine states that the date of order is the date the written acknowledgment is printed and sent to the customer, which is the date it reported to the Department. Ugine argues that this date of order is not random as alleged by Petitioners because the written order

acknowledgments are printed in order to provide notice to the customer. Therefore, Ugine contends that its reported dates of sale are reliable.

Fourth, Ugine argues that the application of adverse facts available is not warranted in this case. Ugine contends that Petitioners provide no basis for the Department to depart from the verified information on the record. Ugine explains that when the Department requested that Ugine provide an alternate U.S. sales listing based on order date as date of sale, Ugine complied with the Department's request. Ugine notes that it reconciled both U.S. sales listings, which the Department verified. Thus, Ugine argues that it has cooperated fully with the Department's investigation, and has not withheld any information or documentation.

Department's Position: We agree with Ugine. In the Preliminary Results, as there were significant changes between contract date and invoice date, we used the earlier of Ugine's U.S. affiliates' invoice date or shipment date as the date of sale. See Preliminary Results.

We continue to find that invoice date is the proper date of sale because the record demonstrates that the date of invoice is when the material terms of the sale are finally set for Ugine's CEP sales. At verification, we found evidence of changes in the material terms of sale between order date and invoice date. In the U.S. Sales Report I, for U.S. pre-selected sale #1, we noted that "the order quantity on Usinor USA's purchase order of X lbs, increased to Y lbs on the Ugine mill invoice. Usinor USA officials explained that order quantities can change with the approval of the customer."⁵ Moreover, according to Usinor Stainless USA's invoice to the unaffiliated customer included in Exhibit 26, this change in quantity for pre-selected sale #1 was also reflected on the invoice to the final customer. Id. at Exhibit 26. We also reviewed two sales to Usinor USA's largest customer and noted that "Usinor USA almost never ships the same quantity ordered," and that "in some instances the invoiced quantity was within the tolerance, but generally the quantity was outside of the ordered tolerance level." Id. at 7-8. In the U.S. Sales Report II, for pre-selected sale #6, we noted that "the quantity changed from X in the purchase order to Y in the invoice," and that "the price changed from A in the purchase order to B in the invoice."⁶ We also reviewed a periodic order, which Hague officials explained set the price and quantity projection over a three-month period, but we noted only a certain percentage of the quantity of this periodic order was shipped. Id. at 4.

⁵ See Memorandum from Cheryl Werner and Kit Rudd, Case Analysts through James C. Doyle, Program Manager, to the File: Verification of CEP Sales for Usinor Stainless USA in the 3rd Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from France, dated July 31, 2003 ("U.S. Sales Report I"), at 12.

⁶ See Memorandum from Cheryl Werner and Kit Rudd, Case Analysts through James C. Doyle, Program Manager, to the File: Verification of CEP Sales for Hague Steel Corporation in the 3rd Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from France, dated July 31, 2003 ("U.S. Sales Report II"), at 8.

As demonstrated by past Department practice, a date other than invoice date “better reflects” the date when “material terms of sale” are established if the party shows that the “material terms of sale” undergo no meaningful change (and are not subject to meaningful change) between the proposed date and the invoice date.⁷ Therefore, if there is a change in price or quantity after the proposed date of sale, and there is no adequate explanation as to why such a change is not meaningful for date of sale analysis, then the Department is bound under the regulation to employ invoice date as the date of sale. See Thai Pineapple Indus. Corp., Ltd. v. United States, 24 Ct. Int'l Trade 284 (2000). The U.S. verification reports and exhibits clearly show that changes can and do occur to the material terms of sale after the date of order for Uginé's CEP sales. Similarly, in Allied Tube, the CIT found that “{t}he presumption in favor of the invoice date was further strengthened by the changes in quantity observed by the Department between the purchase order date and the invoice or shipment date.” See Allied Tube and Conduit Corp. v. United States, 132 F. Supp. 2d 1087, 1090 (Ct. Int'l Trade 2001) (“Allied Tube”). The Department does not find that the record contains sufficient evidence to compel a rejection of the regulatory presumption in favor of invoice date as the date of sale.

Petitioners are correct in noting that the Department's practice is to examine sales from the respondent to the first unaffiliated customer in evaluating the appropriate date of sale, which was not the methodology Uginé used. Moreover, it is of concern that Uginé's methodology was not expressed on the record until the Department noted it in its verification report. Further, the Department finds unconvincing Uginé's explanation that its proxy methodology (i.e., using sales changes from Usinor Stainless USA to Uginé as a proxy for representing changes in sales terms from the first unaffiliated customer to Usinor Stainless USA) adequately responds to the Department's requirement for this information for two reasons. First, use of a proxy methodology reflects a decision to substitute an alternative approach for the standard approach. This impliedly rejects the standard reporting methodology. All such choices should be reported clearly to the Department when the information is first presented so the Department can adequately address the alternative on the record. Second, while the proxy method Uginé used could potentially be an adequate description of Uginé's sales through the “Usinor Stainless USA direct sales” sales channel, it is difficult to understand the applicability of the results of the proxy methodology to Uginé's other four U.S. sales channels, thereby limiting the explanatory effect of the proxy methodology. Finally, without Uginé describing its proxy methodology on the record, the Department was not able to verify its appropriateness as a replacement for the standard approach. These considerations notwithstanding, however, as noted in the discussion above, there is sufficient evidence on the record using the standard analysis showing changes in the material terms of sale from Uginé's U.S. affiliates to the first unaffiliated U.S. customer to fully support a

⁷ See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Mexico, 65 FR 39358 (June 26, 2000) and accompanying Issues and Decision Memorandum, at Comment 2; and Circular Welded Non-Alloy Steel Pipe from Mexico: Final Results of Antidumping Duty Administrative Review, 65 FR 37518 (June 15, 2000), at Hylsa Comment 1.

determination to use date of invoice, thereby obviating the need for further consideration of the proxy methodology.

As we continue to find that invoice date is the appropriate date of sale for Uginé's CEP sales, the issue of the reliability of the U.S. sales listing based on order date is not relevant for the Final Results.

However, we note that the Department verified the U.S. sales listing based on order date and noted no discrepancies. See U.S. Sales Report I, at 11. Furthermore, we verified the reported order date for several of the 15 selected U.S. sales. While we are concerned that Uginé did not identify and explain its proxy methodology before verification, we find that Uginé's provision of an alternative and verified U.S. data set based on the order date outweighs that consideration, especially given that we are continuing to find that the invoice date is the appropriate date of sale, because there is sufficient evidence of material changes in the terms of sale between order date and invoice date. Therefore, we find application of adverse facts available to Uginé's CEP sales is not warranted in this case.

19. U.S. Sales Database

Petitioners argue that Uginé failed to report all of its U.S. sales. Petitioners explain that Uginé did not report CEP sales that had a date of sale during the POR, but the entry date occurred prior to the POR. Petitioners contend that according to the Department's September 20, 2002, Section C questionnaire, for CEP sales made after importation the Department instructed Uginé to "report each transaction that has a date of sale within the POR." Therefore, Petitioners argue that Uginé has failed to report all U.S. sales and constitutes an additional reason to apply adverse facts available to Uginé.

Petitioners also argue that Uginé failed to provide sufficient information to permit the Department to verify a number of U.S. sales. Petitioners note that either the wrong documents were provided or no documentation was provided in support of the material terms of sale, including the date of sale, for pre-selected U.S. sales #4, 8, 9, and 10. Petitioners explain that Uginé failed to provide a copy of the customer's order for pre-selected sale #4. Petitioners explain that Uginé provided the wrong purchase order for pre-selected sale #8. Petitioners explain that Uginé failed to provide a copy of the customer's order for pre-selected sale #9. Petitioners explain that Uginé provided the wrong sales documentation and reported the wrong quantity for pre-selected sale #10.

Uginé contends that its U.S. sales database is complete and verified. Uginé argues that sales sold prior to entry were properly excluded from Uginé's U.S. sales database because the date of sale occurred prior to entry and the date of entry was also prior to the review period. Uginé notes that the Department reviewed Uginé's exclusion of sales prior to the review period and noted no discrepancies.

Uginé also argues that each of the selected sales has been properly verified by the Department. Uginé contends that an examination of the sales documentation for the selected sales demonstrates that each of these sales were fully and properly documented and verified. Uginé explains that for pre-selected sale #4, Usinor Stainless USA generally does not receive a written purchase order for sales out of its

inventory, nor does it issue a written order acknowledgment. Therefore, Uginé argues that the first written documentation of the material terms of sale for pre-selected sale #4 is the invoice issued at the time of shipment. Uginé states that for pre-selected sale #8, the purchase order provided by Uginé was obtained directly from the customer because Hague could not locate the original customer order in its records. Uginé explains that for pre-selected sale #9, Hague's spot sales are made pursuant to customer inquiries and there is no written customer order. Uginé states that for pre-selected sale #10, the thickness tolerance specified on the customer's purchase order is consistent with the merchandise shipped to the customer, and not the wrong gauge as alleged by Petitioners. Uginé also explains that there is no quantity discrepancy for pre-selected sale #10, but rather the line item on the Hague invoice relates to two records reported in Uginé's U.S. sales listing.

Department's Position: We agree with Uginé in part. While Uginé did not report CEP sales with dates of sale during the POR, but entry dates occurring prior to the POR, we find that these sales would have been unnecessary because of the sales-based methodology we have employed in previous reviews to determine which universe of Uginé sales should be examined. The current practice of reviewing sales, and not entries, to determine amounts to be assessed, has been upheld by the CIT in FAG Kugelfischer Georg Schafer KgaA v. United States, No. 95-158, slip op. at 10 (Ct. Int'l Trade 1995), unpub. aff'd, 86 F.3d 1179 (Fed. Cir. 1996).

We note that the preamble of the Final Regulations states that:

{T}he determination of whether to conduct a review of sales of merchandise entered during the period of review hinges on such case- specific factors as whether certain sales of subject merchandise may be missed because, for example, the preceding review covered sales made during the review period or sales may not have occurred in time to be captured by the review. Additionally, the Department must consider whether a respondent has been able to link sales and entries previously for prior review periods and whether it appears likely that the respondent will continue to be able to link sales and entries in future reviews. The Department must consider these factors because of the distortions that could arise by switching from one method to another in different review periods. See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27314.

In the previous review of SSSS from France, we reviewed Uginé's sales of subject merchandise during the POR, and not Uginé's entries of subject merchandise during the POR. Continuing to do so in this review would enhance consistency in how we apply our margin results to a particular period of sales. See Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Administrative Review, 66 FR 18474, 18748 (April 11, 2001). In fact, basing the final results on entries during the POR rather than sales during the POR, would likely result in the very kinds of distortion the preamble to the Final Regulations stated we should avoid. See Final Regulations, 62 FR 27296, 27314. See also Notice of Final Results of Antidumping Duty Administrative Review and Recision of Administrative Review in Part: Canned Pineapple Fruit From Thailand, 66 FR 52744

(October 17, 2001) and accompanying Issues and Decision Memorandum, at Comment 11. This is because Ugine's U.S. and home market ("HM") sales databases have been reported, as we requested, on the basis of sales, rather than entries. Given that there can be a significant period of time between entry date and sale date, shifting the basis of this review at this stage may exclude a significant number of sales with sale dates within the POR, but entry dates outside the POR, and could cause overlaps in the sales considered. A switch to the use of entry dates would be a break with the methodology applied in the previous review in which the U.S. sales situation was the same as it is in the instant review. Therefore, we continue to base Ugine's universe of sales reviewed on sales made within the POR rather than entries within the POR for purposes of calculating the dumping margins.

We also agree with Ugine that its U.S. sales database is complete and verified. Petitioners have alleged that Ugine failed to provide sufficient information to permit the Department to verify a number of U.S. sales. However, we verified in full each of the 15 selected U.S. sales. Petitioners have noted missing or wrong documents for four of the 15 selected U.S. sales, mostly pertaining to documents substantiating the order date. However, the record is clear that for certain of Ugine's CEP sales, no written purchase orders are received or issued. We stated in the Preliminary Results that for some CEP sales, Ugine was unable to report an order date because Hague did not maintain this information in its normal course of business. Furthermore, we verified that Hague did not maintain this information. See U.S. Sales Report II, at 4-5 ("We asked Hague officials whether they issued an order acknowledgment for this order. Hague officials stated that they do not issue order acknowledgments and that the customers typically do not require acknowledgments."). Finally, each of Ugine's rebuttals on these points is factually accurate.

Further, verification is not intended to examine all data related to a particular sales transaction in order to determine the reliability of each piece of data within a given sales transaction. As we explained in Steel Bar from France, "the Department's verification process is akin to an "audit" and the Department has the discretion to determine the specific information it will examine in its audits." See Notice of Final Determination at Less Than Fair Value: Stainless Steel Bar from France, 67 FR 3143 (January 23, 2002) and accompanying Issues and Decision Memo at Comment 4 ("Steel Bar from France"). Moreover, the courts concur that verification is a spot check and it is not intended to be an exhaustive examination of the respondent's records. See Mansanto v. United States, 698 F. Supp 275, 281 (CIT 1988); See also Bomont Industries v. United States, 733 F. Supp. 1507, 1508 (CIT 1990) (comparing verification to an audit). The courts have also noted that Congress has given Commerce wide latitude in formulating its verification procedures. See Micron Tech., Inc. v. United States, 117 F.3d 1386, 1396 (CAFC 1997). Based on the information examined at verification, we are relying on Ugine's responses as submitted, subject to the minor corrections previously noted in the Preliminary Results and elsewhere in this Issues and Decision Memorandum. The Department has useable data on the record of this proceeding for the U.S. sales at issue and has incorporated this data into its analysis for the Preliminary Results and will continue to use this data for the final results.

20. Affiliated Freight-Forwarder Expenses

Petitioners contend that Ugine has failed to demonstrate that Ugine paid arm's-length prices to Ugine's affiliated freight-forwarder for its U.S. sales. Petitioners explain that Ugine provided two transactions with its affiliated freight-forwarder, and calculated a profit on the re-sale of freight as evidence of arm's-length dealings between Ugine and its affiliated freight-forwarder. However, Petitioners contend that these transactions did not demonstrate that Ugine's affiliated freight-forwarder prices were at arms' length, therefore, the Department should find Ugine's reported freight forwarding expenses to be unreliable, and should apply as facts available the highest reported per-unit fee from its affiliated freight-forwarder for every U.S. sale.

Ugine argues that its reported freight-forwarder expenses are reliable and reflect market prices. Ugine notes that it exclusively uses its affiliated freight-forwarder to purchase and coordinate international transport services, such as ocean freight and stevedoring. Ugine contends that around 96 percent of its fees paid to its affiliated freight-forwarder are "pass through" fees, meaning that 96 percent of these fees "pass through" its affiliated freight-forwarder and are wholly applied to pay the charges of the unaffiliated service providers actually providing the international freight and stevedoring, *etc.* Ugine contends that only approximately 4 percent of its reported freight forwarding expenses are retained by its affiliated freight-forwarder. Thus, Ugine argues that the Department should continue to use the actual, market freight-forwarder expenses used in the Preliminary Results.

Department's Position: We agree with Petitioners, in part. It is our standard practice to request respondents to demonstrate that transactions between affiliated parties are at arm's-length prices. Accordingly, we requested that Ugine show that its affiliated freight-forwarder fees were at arm's-length. Ugine responded that it is difficult to compare the fees charged by its affiliated freight-forwarding services to fees charged by an unaffiliated freight-forwarder, because the two freight-forwarders are used for different services. We did not verify Ugine's claim that it could not compare the fees charged by its affiliated freight-forwarder to the fees charged by its unaffiliated freight-forwarder. As discussed above, the Department's verification process is akin to an "audit" and the Department has the discretion to determine the specific information it will examine in its audits. See Steel Bar from France, 67 FR 3143.

Ugine has provided invoices from its affiliated freight-forwarder as well as invoices from the unaffiliated entities providing the actual freight services. See Ugine's January 29, 2003 supplemental Section C response, at Appendix 16. The invoices from the unaffiliated service providers demonstrate that the affiliated freight-forwarder is charging Ugine in full for the actual freight service fees incurred for these transactions.

We disagree with Ugine's argument that a profit made on the services of the affiliated freight-forwarder provided to Ugine proves that these services were at arm's length. The arm's length test compares prices charged by or paid to affiliated parties with prices which would otherwise be obtained in transactions with unaffiliated parties. See Circular Welded Non-Alloy Steel Pipe From the Republic of

Korea; Final Results of Antidumping Duty Administrative Review, 63 FR 32833, 32838 (June 16, 1998). The level of profit on these sales is not a relevant consideration because of the potential for manipulation of profit by affiliated parties.

Finally, it would be inappropriate to use the rate proposed by Petitioners, because use of such a rate would require an adverse finding under section 776(b) of the Act, and we find that Uginé has acted to the best of its ability with respect to this adjustment. Since there is only a small number of sales using the affiliated freight-forwarder and Uginé has stated that comparison would not be appropriate because its freight-forwarders are used for different services, we continued to use Uginé's reported affiliated freight-forwarder expenses for the final results.

21. U.S. Inventory Carrying Costs

Petitioners contend that the Department should reject Uginé's use of a separate inventory carrying cost period for U.S. sales than for HM sales. Petitioners argue that the inventory cost calculation can not be tied to a particular market, because it is based on the average number of days that all inventory is held as finished goods, measured from the end of production to the date of sale. Petitioners contend that by using different periods in the calculation of inventory carrying cost for U.S. sales than for HM sales, Uginé has artificially lowered net normal value. Petitioners argue that the Department should apply facts available and use the higher average calculated for HM sales as the basis for the inventory carrying cost for U.S. sales.

Uginé contends that the separate inventory carrying cost periods for U.S. sales and HM sales are accurate and should continue to be the bases for the calculation of inventory carrying costs. Uginé explains that the Department verified Uginé's calculations of the separate U.S. and HM inventory carrying cost periods, and that these calculations demonstrate clearly that these periods were different. Uginé contends that Petitioners did not refute the accuracy of Uginé's calculations of separate inventory carrying periods for HM and U.S. sales. Uginé contends that the fact that Uginé accurately calculated separate averages for HM inventory and inventory bound for the U.S. market refutes petitioners' contention that inventory carrying cost calculations cannot be tied to a particular market.

Department's Position: We agree with Uginé. At verification, we reviewed the computer program Uginé used to calculate the average number of days in inventory of merchandise for the HM and U.S. market. Uginé officials explained that the average number of days in inventory is calculated by performing a query to the computer system. Uginé officials stated that the computer program maintains the date of the end of production and the date of shipment from the factory for each coil. See Home Market Verification Report at 27; see also Exhibit 27 at 4307-4308. Because we verified the accuracy of Uginé's calculation of the average days in inventory for both the HM and U.S. market, we continued to use the reported inventory carrying costs for the final results.

22. Home Market Credit Expenses

Petitioners contend that Uginé incorrectly calculated credit expenses for certain HM sales. Petitioners argue that Uginé improperly based its calculation of credit expenses for those certain sales on the wrong time period. Petitioners allege that Uginé incorrectly used the date of shipment from the factory as the end point of the inventory carrying costs calculation, and the starting point for the credit expense calculation. Petitioners argue that the credit expense calculation should begin at the date of invoice for these sales. Petitioners contend that, therefore, the Department should not make a credit adjustment on these certain HM sales for the final results.

Uginé contends that it properly reported credit expenses for these sales to the Department. Uginé explains that Petitioners are contending, as they did in the previous review, that the credit expense on certain HM sales was calculated incorrectly. Uginé argues that Petitioners' argument is directly contrary to the Department's established practice, as well as the position taken by Petitioners' counsel in the investigation of stainless steel wire rod from France. See Team Concurrence Memorandum in Certain Stainless Steel Wire Rods from France, at 8 (December 20, 1993). Uginé explains that in the Team Concurrence Memorandum, the Department agreed with Petitioners' arguments that costs incurred during the consignment inventory period should be classified as direct credit expenses rather than inventory carrying costs. Moreover, Uginé notes that the Department rejected this same contention in the previous administrative review of this case. See SSSS from France, 2nd Review, at Comment 18.

Uginé also argues, in the alternative, that if the Department were to modify either its credit expenses or inventory cost calculations for HM sales as the Petitioners argue it should, then the Department should similarly modify the same calculations for U.S. sales.

Department's Position: We agree with Uginé. As we stated in the previous review of this case, although we agree with the Petitioners that Uginé retains title of the merchandise until it is removed from inventory, we have determined in other cases that because the respondent is unable to sell the merchandise to any other customer while in inventory, it is a direct expense. In Certain Stainless Steel Wire Rods from France, we articulated a position which directly addresses the issue.

“We agree that costs incurred during the consignment inventory period are not inventory carrying costs, but are direct credit expenses. During the period that the merchandise remained in respondents' customer's consignment inventory the merchandise was not available for sale to any other of Respondent's customers. Since it was not available for sale, we have determined that the expense incurred by respondent while it remained in its customer's inventory is a direct expense.” See Certain Stainless Steel Wire Rods from France, 58 FR at 68870 (December 29, 1993).

Moreover, we explained that the Department determined that the “credit period for home-market consignment sales began at the time the merchandise left the producing mill en route to its consignment customer’s inventory, and not when the final customer was invoiced (respondent invoiced its consignment customer when the consignment customer withdrew the material from its warehouse and invoiced its customer).” *Id.* In addition, the Department has affirmed this methodology in recent cases. See Notice of Final Results of Antidumping Duty Review: Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands 65 FR 67347 (November 9, 2000) and accompanying Issues and Decision Memorandum, at Comment 1B; see also Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Germany, 67 FR 3159 (January 23, 2002).

Therefore, for the final results we did not change Ugine’s credit expense calculation for HM sales.

23. Home Market Inland Freight Expenses

Petitioners argue that according to Section 773(a)(6)(B)(ii) of the Act, Ugine should not be permitted to account for freight revenue or freight expenses that were not included in the gross unit price to the customer, but separately charged on the invoice. Petitioners explain that Section 773(a)(6)(B)(ii) of the Act requires that the price will be reduced by the charges incurred in transporting the subject merchandise from its original location to the place of delivery only if these charges are included in the price. Petitioners also state that it is the Department’s policy to have respondents report only the gross unit price for merchandise. Thus, Petitioners contend then that where that gross unit price does not include freight charges, the Department will not allow an adjustment for freight expense or revenue.

Ugine contends that Petitioners’ argument goes against long-standing Department practice where the Department has consistently added freight revenue to the “price” for HM and U.S. sales, and then deducted actual freight costs incurred by the seller from the freight-included price.⁸ Furthermore, Ugine

⁸ See Notice of Final Determination of Sales at Less Than Fair Value: Certain Carbon and Alloy Steel Wire Rod from Canada, 59 FR 18791, 18796 (April 20, 1994) (“Wire Rod from Canada”) (The Department stated that “where freight and movement charges are not included in the price, but are invoiced to the customer at the same time as the charge for the merchandise, the Department considers the transaction to be similar to a delivered price transaction since the seller may consider its return on both transactions in setting price.”); Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from The Netherlands, 67 FR 31268, 31270 (May 9, 2002); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Carbon and Certain Alloy Steel Wire Rod from Canada, 67 FR 17389, 17392 (April 10, 2002); Oil Country Tubular Goods, Other Than Drill Pipe From Korea: Final Results of Antidumping Duty Administrative Review, 67 FR 12520, 12520 (March 19, 2002) (“OCTG from Korea”); Preliminary Results of Antidumping Administrative Review: Stainless

argues that the Department rejected this same argument in the last administrative review of this case. See SSSS from France, 2nd Review, at Comment 7. Uginé contends that the Department has in the past consistently added freight revenue to U.S. and HM sales prices, regardless of whether the line-item invoice price and freight charges to the customer are listed separately, and then deducted the actual freight costs incurred by the seller from these prices with the freight revenue included.

Uginé further contends that Petitioners' interpretation of this rule would invite manipulation by allowing a respondent to raise or lower the line-item prices of merchandise in relation to the accompanying freight charges for that same merchandise, without affecting the total amount paid by the customer. Uginé contends that because of this potential for manipulation, the Department has adopted the practice of including both the nominal line-item price and the nominal freight charge in the total price, and then deducting the actual freight charges incurred from that price. Uginé contends that there is no basis for the Department to change its established practice in the current administrative review.

Department's Position: We agree with Uginé. As stated by Uginé, the Department rejected this same argument by Petitioners in the previous administrative review. Petitioners have presented no new arguments that would justify the Department in deviating from that previous analysis. In that review, we cited OCTG from Korea, where the Department stated that:

{B}oth the freight revenue and inland freight from the warehouse to the customer expense should not be deducted from the total gross unit price. Instead, we have added freight revenue to the gross unit price to calculate the total gross unit price and then deducted the inland freight costs from the plant to the customer as part of U.S. movement expenses. OCTG from Korea, 67 FR 12,520 at Comment 1.

We continue to determine that this methodology is appropriate. In addition, we agree with Uginé that it is the Department's practice to deduct freight costs incurred by the seller from the freight-included price. See Wire Rod from Canada, 59 FR at 18796. Consistent with Wire Rod from Canada, where costs have been invoiced at the same time as sales of the subject merchandise, the gross unit price of the subject merchandise is properly considered to include such revenue and expenses. Therefore, we added any such revenue to the gross unit price and deducted any such freight expenses as appropriate, for the final results.

24. Home Market Rebate

Steel Sheet and Strip in Coils From France, 66 FR 41538, 41540, 41541 (August 8, 2001); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar From France, 66 FR 40201, 40204 (August 2, 2001).

Petitioners contend that Uginé incorrectly calculated certain HM rebate expenses based on the gross unit price without deducting discounts. Petitioners explain that Uginé calculated its sample HM rebate in its accounting books as a percentage of the gross unit price, plus surcharge and freight revenue, minus discounts. However, Petitioners argue, when Uginé reported its sample HM rebate to the Department, Uginé did not deduct the amount of the discounts from the sum of the gross unit price, surcharge and freight revenue before calculating the percentage, and thereby inflated the amount of the reported rebate.

Petitioners contend that the Department has verified that Uginé made this error in calculating its HM rebate expense. Petitioners state that, according to Exhibit 35 of the Home Market Verification Report, the rebate granted to the customer was based on the net amount of the invoice for the sale. Furthermore, Petitioners contend that the verification exhibits show that Uginé has made the same error in calculating its other rebate programs. Petitioners argue that because they have raised these issues multiple times, and Uginé has failed to correct the calculations, the Department should reject all HM rebates reported by Uginé for the final results.

Uginé contends that all of Uginé's reported HM rebates are properly calculated based on the sum of the gross unit price, freight revenue and billing adjustment, minus early payment discounts. See Uginé's April 15, 2003, submission, at Appendix 2SSB-2 (where it states "{T}he amount reported in the REBATEH field is rebate percentage x (gross unit price + surcharges + freight revenue + billing adjustments - early payment discounts)."). Uginé contends that the negative amounts in Exhibit 35 of the Home Market Verification Report, which the Petitioners claim are discounts, are credit notes unrelated to any discount. Uginé contends that the complete sales documentation included in Exhibit 35 shows that there were no discounts related to this sale.

Department's Position: We agree with Uginé. At verification, we examined Uginé's HM rebate program and noted no discrepancies. See Home Market Verification Report, at 24. Petitioners contend that Uginé incorrectly calculated rebates based on gross unit prices, without taking into account any discounts. Petitioners specifically allege that Uginé's rebate expense calculation included in Exhibit 35 is incorrect. However, for the rebate expense in question, Uginé correctly calculated the per-unit rebate expense by using the net price. We find no evidence that Uginé provided its customer with any discounts, and thus, Uginé could not have failed to deduct the alleged discounts from the gross unit price in its rebate expense calculation. Since Uginé has correctly calculated its rebates based on the sum of the gross unit price, surcharge and freight revenue, minus any deductions, we did not make any changes to Uginé's reported per-unit rebate expenses.

25. Affiliated Inland Freight Carrier Expenses

Petitioners contend that Uginé's HM inland freight expenses paid to an affiliated common carrier were not made at arm's-length prices. Petitioners explain that the Department's policy is to accept affiliated party expenses only if respondents affirmatively demonstrated that they have been made at arm's-length

prices. Petitioners contend that the Department will not deduct affiliated party expenses from the gross unit price unless the Department can test that the expenses were not made in excess of arm's-length prices. Petitioners note that Chapter 8 of the Department's Antidumping Manual, states that the Department will test whether affiliated-party expenses represent arm's-length prices, so as to not skew the Department's dumping analysis. Petitioners argue that if the Department is unable to test the affiliated-party expenses for arm's-length prices, it will not adjust the gross unit price downward for the claimed affiliated party expenses.⁹

Petitioners contend that the fact that the prices paid by Ugine to an affiliated common carrier were higher than the prices paid to unaffiliated carriers is clear evidence that they were not made at market rates. Therefore, Petitioners argue that the Department should not allow an adjustment to the HM gross unit price for inland freight expenses, or alternatively, reduce all of Ugine's HM freight expenses by the percent the affiliated common carrier's prices exceed the prices of the unaffiliated carriers in the HM.

Ugine contends that while Petitioners assert that the slightly higher prices paid to the affiliated common carrier for HM sales shipments would have the effect of lowering the dumping margin, they neglect to point out that the higher cost paid to the affiliated common carrier for U.S. sales shipments would have the opposite effect of raising the dumping margin. Ugine also notes that the Department has specifically addressed this issue in prior reviews and found that the prices paid to the same affiliated common carrier are reliable.¹⁰

Ugine argues that because there is only a small difference between prices paid to the affiliated common carrier and those paid to unaffiliated carriers, and because there is no new evidence provided by Petitioners in this review that would justify the Department in deviating from its decisions on this issue in prior reviews, the Department should continue to use the prices paid to the affiliated common carrier in the final calculations. Ugine argues, in the alternative, that if the Department makes an adjustment to the prices paid to the affiliated common carrier in the HM, they must make a similar adjustment to the prices paid to the affiliated common carrier in the U.S. market.

Department's Position: We agree with Ugine. During the POR, Ugine employed an affiliated common carrier for a portion of its HM and U.S. sales. At Ugine's HM verification, we examined the

⁹ See Antidumping Manual, Chapter 8, at 16, 36, and 97. See, also Certain Cut-to-Length Carbon Steel Plate from Finland; Final Results of Antidumping Duty Administrative Review, 63 FR 2952, 2952 (January 20, 1998) and accompanying Issues and Decision Memorandum, at Comment 5.

¹⁰ See SSSS from France, 2nd Review, at Comment 17; see also Memorandum to the File: Home Market Sales and Cost Verifications of Ugine S.A. ("Ugine"); First Administrative Review of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from France, dated July 31, 2001, at 16.

prices paid to the affiliated common carrier and the prices paid to unaffiliated common carriers. See Home Market Verification Report, at Exhibit 36. Uginé adopted the Department's arm's-length test methodology to test the prices paid to its affiliated common carrier compared to the prices paid to the unaffiliated common carriers. Uginé officials explained that the freight tables used are the same for all freight companies Uginé used during the POR, including the affiliated common carrier. Id. at 24. Uginé officials explained that they use multiple freight companies because neither the affiliated common carrier nor any other single freight company is able to cover all the destinations and the full number of shipments for Uginé. Id. We noted that the weighted-average per-unit price paid to the affiliated party was higher than the weighted-average per-unit price to the unaffiliated party for both HM and U.S. sales. See Uginé Home-Market Verification at 24.

In addition, we note that in the most recently completed review of this order, Uginé applied the same arm's-length methodology to test the prices paid to the common carrier. In that case, we continued to use the prices paid to the affiliated common carrier. See SSSS from France, 2nd Review at Comment 17. Because the Petitioners have not provided sufficient evidence to demonstrate that the prices paid to the affiliated common carrier are unreliable, we will continue to use the prices Uginé paid to the affiliated common carrier in our margin calculation for the final results.

26. Uginé France Service Commissions

Petitioners argue that Uginé has failed to report that actual commission amounts on sales to its affiliated party, Uginé France Service ("UFS"), so that the Department is unable to test whether the affiliated-party expenses are at arm's-length prices. Petitioners explain that for their reported commission sales, Uginé reported the expenses incurred by UFS, instead of the actual commission amount of the sales. Petitioners contend that the Department's policy is to accept affiliated-party expenses only if they are affirmatively demonstrated by the party to have been made at arm's-length prices. See Antidumping Manual, Chapter 8, at 16, 36, and 97. Petitioners further argue that the Department will not make a downward adjustment to the gross unit price based on an affiliated-party expense unless the Department can test that the expense was made at arm's-length prices. Id. Therefore, Petitioners contend that because Uginé did not report affiliated-party commissions in a manner that allows the Department to test whether the commissions were made at arm's-length, the Department should not adjust the HM gross unit price for the reported commission expenses.

Uginé argues that because neither Uginé nor IUP makes any sales through non-affiliated agents, and UFS does not provide sales services to any unaffiliated party, it is impossible for Uginé to provide the Department with a comparison price for commissions. Thus, Uginé contends that because there are no commissions paid to non-affiliated parties for the Department to use to make an arm's-length determination, Uginé properly reported the expenses incurred by UFS, rather than the amount of the commission.

Ugine further argues that, contrary to Petitioners' argument, the arm's-length test is not applicable to the reported expenses incurred by UFS because they are not part of an affiliated-party transaction. Ugine contends that Petitioner's argument confuses commissions paid to UFS by Ugine, which would be subject to the arm's-length analysis, with the expenses incurred by UFS, which Ugine reported and which are not applicable to the arm's-length test.

Finally, Ugine contends that the Department has verified and accepted this methodology in past reviews and the less than fair value investigation, and these expenses were reported in accordance with the Department's practice.¹¹ Thus, the Department should continue to do so for these final results.

Department's Position: We agree with Ugine. Where a commission is paid between affiliated parties and may not be at arm's-length, it is the Department's practice to disregard that commission, and instead deduct the actual selling expenses incurred by the sales agent, from the CEP, pursuant to section 772(d)(1)(C) and (D). See Mitsubishi Heavy Industries, Ltd. v. U.S., 54 F. Supp. 2d 1183, 1193 (CIT,1999). Therefore, we continued to use the reported expenses incurred by UFS for commission sales in the final results.

27. Indirect Selling Expenses

Petitioners contend that Ugine's submitted indirect selling expenses are based on allocations that are not in compliance with Department policy. Petitioners explain that the Department requires respondents to allocate indirect selling expenses over the value of sales, because such expenses cannot be tied to particular sales.¹² Petitioners contend that because Ugine used unusual allocation methodologies, including allocations based on the number of invoice/order line items, without providing justification as to why Ugine deviated from the value-based allocation, the Department should reject Ugine's submitted indirect selling expenses in the final.

¹¹ See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders, 60 FR 10900, 10915 (February 28, 1995) (where the Department stated that "{i}n its questionnaire responses {the respondent} provided specific data on the expenses that {the affiliated agent} incurred with respect to the sales in question. Accordingly, rather than use the commission, which is a transfer payment between {the affiliates}, we have used the actual expenses incurred by {the affiliated agent} with respect to these sales.").

¹² See Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Belgium, 64 FR 15476 (March 31, 1999) (where the Department stated that, in calculating indirect selling expenses, "the Department should use a value-based allocation rather than a quantity-based one," and that "the Department's normal practice is to base calculations of {selling, general, and administrative} expenses based on value {or cost}.").

Ugine contends that its reported indirect selling expenses are accurate and in compliance with the Department's established practice. Ugine explains that it creates a separate order line on the invoice for each product ordered by the customer, and it bases its allocation of indirect selling expenses on the number of line items. Ugine contends that the number of these line items is the best indicator of indirect selling expenses because each line item requires a discrete evaluation, regardless of the quantity or value of that item. Ugine notes that this methodology has been accepted by the Department in the less-than-fair-value investigation, and the two previous reviews of this case. Ugine notes that Petitioners made this same argument in the last administrative review, and it was rejected by the Department at that time. Ugine argues that Petitioners have provided no new basis for the Department to change its conclusion or to depart from the established practice in this case. Thus, Ugine contends that its reported and verified indirect selling expenses should continue to be used in the Department's final results.

Department's Position: We agree with Ugine. As we stated in the previous administrative review of this order, we do not believe Ugine's allocation methodology is illogical. In its January 29, 2003, supplemental section B response, Ugine explained why the order/invoice system was a reliable means of allocation of indirect selling expenses:

For most of Ugine's selling activities, the effort required for each sale depends primarily on the number of items ordered: Because each item in the order requires a separate evaluation, the time required is a function of the number of items ordered. On the other hand, because the evaluation of each item is essentially the same, regardless of the quantity or price of that item, the time required is not a function of the order size. Accordingly, the expenses for cost centers that provide sales functions for sales in France and other markets were allocated between markets based on the number of order/invoice line items."

Ugine's January 29, 2003, section B supplemental response, at 31.

Because Ugine's allocation method allocates cost center expenses in a logical manner, and because the Petitioners have submitted no new evidence that would justify the Department in deviating from determinations on this issue in previous reviews of this order, the Department continued to use Ugine's reported indirect selling expenses ratio.

28. Gross-to-Net Adjustment

Petitioners contend that it is the Department's practice to convert sales and expenses to a common weight basis (e.g., gross versus net weights), where there were sales and/or expenses that were originally based on a different weight basis. Petitioners explain that normally the Department uses the conversion factors supplied by respondents. See Final Determination of Sales at Less Than Fair Value: Cut-to-Length Carbon Steel Plate from Finland, 58 FR 37122 (July 9, 1993); and Final Determination of Sales at Less Than Fair Value: Certain Welded Stainless Steel Pipes from Taiwan, 57 FR 53705

(November 12, 1992). Petitioners note that Ugine supplied a single average HM gross-to-net conversion factor (referred to as a “brut-to-net” conversion factor), and a single average U.S. market gross-to-net conversion factor, regardless of products.

Petitioners contend that the Department should reject this average gross-to-net conversion factor and use instead the actual gross and net weights for each HM and U.S. market sale. Petitioners argue that Ugine has the actual gross and net weights for each sale, as shown in Exhibit 43 of the Home Market Verification Report. Petitioners contend that an examination of Verification Exhibit 43 shows that by using an average gross-to-net conversion factor, instead of the actual gross and net weights contained in this document, Ugine has overstated the expenses that required a weight conversion, thereby decreasing net normal value.

Petitioners contend that there was no need for Ugine to use average gross-to-net conversion factors because they had the actual sales-specific gross and net weights in their books and records, as well as in a computerized form. Petitioners argue that the average conversion factors do not accurately reflect gross and net weights for different products, which vary by product and packaging specifications.

Petitioners contend that it is the Department’s preference to require reporting of actual expenses. Petitioners argue that the use of average, and not the sales-specific, gross-to-net conversion factors results in a reporting of estimated expenses, which are also not accurate as Petitioners showed in their recalculation using Exhibit 43. Petitioners contend that it is Department practice to reject average expenses when more accurate or actual expenses are available. Petitioners cite to CSPT from Turkey where the Department stated that “we {the Department} agree with petitioners that the product-specific weight-saving factors should be used wherever available,” in support of using Ugine’s sale-specific conversion factors. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey, 61 FR 69,067, 69,074 (December 31, 1996) (“CSPT from Turkey”)

Petitioners contend, therefore, that the average gross-to-net conversion factor used by Ugine should be rejected by the Department in the final results. Furthermore, Petitioners argue that because it is no longer possible to calculate the actual net weights for each product, the reported freight rates and warehousing expenses should be multiplied by the average conversion factor used by Ugine, to counter the effect of the average conversion factor.

Ugine argues that its average gross-to-net conversion factor is proper and should not be rejected. Ugine contends that calculating a transaction-specific gross-to-net for each sale would have a negligible impact on the calculations, and would impose an unreasonable burden on Ugine.

Ugine contends that Petitioners’ calculation of a transaction-specific conversion factor using Exhibit 43, pre-selected sale #9, results in a difference of only a minimal percentage for freight expense. Ugine argues that, according to 351.413, anything less than 0.33 percent is considered an insignificant

adjustment by the Department and thus the difference between using the average gross-to-net conversion and the actual gross-to-net conversion for pre-selected sale #9, falls below 0.33 percent. Uginé notes that an average conversion factor will likely be slightly higher or lower than a transaction-specific factor for any one specific sale.

Uginé also contends that Petitioners' argument that the transaction-specific gross-to-net conversion factors are readily re-calculated is not upheld by Petitioners' own proposed re-calculation. Uginé explains that Petitioners miscalculated the conversion factor in their example using Exhibit 43, because Petitioners incorrectly based their calculations on the weight of only one of three shipments included under the freight expense. Uginé argues that the calculation of accurate transaction-specific gross-to-net conversion factors cannot be readily accomplished.

Thus, Uginé contends that its use of an average gross-to-net conversion factor is reasonable and appropriate, and the Department should accept their methodology for the final results.

Department's Position: We agree with Uginé. We examined Uginé's calculations of their average gross-to-net conversion factors for each market at verification, and noted no discrepancies in their calculations. See Home Market Verification Report at 29. While actual net and gross weights are listed on the shipping notice cited by Petitioners in Exhibit 43, we agree with Uginé that in this case using the actual gross-to-net conversion factor would have a negligible impact on the calculations, and would impose an unreasonable burden on Uginé because of the large number of sales.

Moreover in CSPT from Turkey, the Department did not state that product-specific weights must be used, as claimed by Petitioners. See CSPT from Turkey, at 61 FR 69074-75. Rather, we found that "product-specific weights should be used wherever available," and "[g]iven that specific weight-savings ratios for Borusan's products are on the record for most sales, there is no reason to use an average ratio where product-specific ratios are available." Id. We are persuaded that in the instant review it is an unreasonable burden upon the respondents to calculate transaction-specific conversion factors for such a large number of sales during the POR. Therefore, we continued to accept Uginé's average gross-to-net conversion factors for the final results.

29. Constructed Export Price Offset

Petitioners contend that Uginé's HM and U.S. market sales were made at the same level of trade ("LOT"), and therefore, no CEP offset is warranted. Petitioners argue that the record shows that Uginé offered, at best, equal services to its customers in the HM and U.S. market. Petitioners explain that according to 19 U.S.C. 1677b(a)(1)(B), the Department shall compare U.S. CEP sales to the sales used to determine normal value at the same LOT. Petitioners state that the Department examines the stages in the marketing process and the selling functions for each channel of distribution in order to determine whether different LOTs exist for the HM and U.S. market.

Petitioners contend that to have an adjustment for a CEP offset, Ugine must first show that its HM sales were at a more advanced LOT than its U.S. sales. See 19 U.S.C. 1677b(a)(7)(B) and 19 C.F.R. 351.412(f)(1)(ii). Petitioners explain that the Department would then need to determine whether this difference in LOT affected price comparability, as shown by a pattern of consistent pricing differences between sales at different LOTs in the HM. See 19 U.S.C. 1677b(a)(7)(A)(ii) and 19 C.F.R. 351.412(d). Petitioners argue that Ugine only qualifies for a CEP offset, when its HM sales are at a more advanced LOT than its U.S. sales, but where the second criterion can not be satisfied. Petitioners explain the CEP offset in that case would be in the form of an deduction from normal value of HM indirect selling expenses, up to the amount of their U.S. market indirect selling expenses.

Petitioners contend that Ugine's HM price, for purposes of the LOT analysis, includes the following services and expenses: the extension of payment terms, discounts and rebates, freight services, insurance expenses, warranty expenses, indirect selling expenses, inventory carrying costs, and packaging services, in accordance with 19 C.F.R. 351.412(c)(iii). See Home Market Verification Report, at Exhibit 43 (due to the proprietary nature of certain of Ugine's services and expenses in the HM, please see Ugine Final Results Analysis Memo). Furthermore, Petitioners argue that the U.S. CEP price, for purposes of the LOT analysis, includes the following services and expenses: domestic inland freight from plant to warehouse, French warehousing expenses for all sales, other French warehousing expenses for certain sales, French freight from port/warehouse to port of exit, French inland insurance, French brokerage and handling costs, international freight, marine insurance, warranty expenses (incurred by Ugine), Ugine's domestic indirect selling expenses incurred on U.S. sales, Ugine's domestic inventory carrying costs, Ugine's extended credit terms to Usinor USA, U.S. customs duties, and packing expenses, in accordance with 19 C.F.R. 351.412(c)(ii). See Home Market Verification Report at Exhibit 42.

Petitioners note that the Department properly found that there is a single LOT in the HM and that there is a single LOT in the U.S. market. See Preliminary Results, at 47055. Petitioners contend that a comparison of the above listed services and expenses in the HM and the U.S. market shows that Ugine offers fewer services to its HM customers, and therefore, Ugine's HM sales are at a less advanced LOT than their U.S. market sales.

Petitioners contend that the Department granted Ugine a CEP offset in the Preliminary Results based on a faulty understanding of the requirements for a CEP offset. Petitioners contend that the Department incorrectly considered only indirect selling activities, such as sales strategy, processing orders, and promoting products, in conducting the LOT analysis, when they should have considered all selling activities not associated with U.S. economic activities. Petitioners contend that the statute directs the Department to base the LOT analysis on the starting price to the first unaffiliated U.S. customer, adjusted downward for the expenses listed in 1677a(d), and so the Department should have determined that Ugine's U.S. selling activities included the expenses listed above.

Finally, Petitioners contend that in the LOT analysis, the Department improperly compared the U.S. selling activities performed by Ugine to those performed by Ugine's U.S. affiliates. Petitioners argue that the proper comparison is between the HM selling activities of Ugine and the U.S. selling activities of Ugine.

Ugine contends that the verified record evidence clearly demonstrates that Ugine's HM sales were at a more advanced LOT than Ugine's U.S. market CEP sales, and that the Department should continue to apply the CEP offset in the final results. Ugine argues that fewer and different selling functions were performed by Ugine for CEP sales. Ugine contends that the LOT analysis is a comparison of the selling activities performed on HM sales (i.e., all selling activities) with the selling functions performed on U.S. CEP sales at the constructed LOT (i.e., the selling activities not associated with U.S. economic activity). Thus, Ugine contends that selling activities by Ugine's U.S. affiliate, Usinor Stainless USA, are not considered part of the constructed LOT for Ugine's CEP sales.

Ugine argues that, according to a table setting forth the selling activities performed and indicating the degree of activity included in Appendices A-4-A and A-4-B of Ugine's October 7, 2002 Section A response, in both the HM and U.S. market, respectively, a high degree of activity is undertaken by Ugine, IUP, or UFS in 17 out of 19 categories of selling activities for HM sales, while a high or medium degree of activity is undertaken by Ugine or IUP in only 7 of the 19 categories for U.S. sales. Furthermore, Ugine explains that a low degree of activity is undertaken in 8 of the 19 categories, and no activity is undertaken in 3 categories for U.S. sales. Thus, these tables demonstrate that fewer selling activities are performed and a lower degree of selling activity is undertaken at the constructed LOT.

Ugine contends that Petitioner's comparison of Ugine's HM and U.S. market selling activities is skewed because Petitioners break the transportation activities for the U.S. market into minute elements, thereby creating the impression of more activities. Ugine contends that this distorts the significance of these activities in comparison to more time consuming activities, such as those involving customer contact.

Ugine contends that Petitioners created a warehousing activity for U.S. CEP sales, despite the fact there were no significant warehousing activities other than brief maintenance of the merchandise prior to containerization for ocean shipment. Ugine argues that Petitioners then equated this warehousing activity to activities associated with arranging other warehousing for certain sales in the HM, which is a significantly more important selling activity. Ugine notes that activities associated with arranging other warehousing for U.S. CEP sales are performed by Usinor Stainless USA, not Ugine.

Ugine contends that Petitioners attribute a similar risk of payment for Ugine's HM sales and Ugine's sales to its affiliate Usinor Stainless USA, when in fact the levels of risk and activity are significantly less for Usinor Stainless USA, in part because Usinor Stainless USA purchases insurance for its receivables.

Finally, Uginé contends that Petitioners include some selling activities as activities performed by Uginé on CEP sales, that are in fact U.S. business activities because they are performed by Uginé's U.S. affiliates, Usinor Stainless USA and Hague. Uginé explains that Petitioners' LOT analysis equates "inventory maintenance" for HM and U.S. CEP sales, despite the fact that this activity is performed by Usinor Stainless USA and Hague for U.S. CEP sales, and by Uginé and UFS for HM sales. Uginé contends that Petitioners also attempt to equate the selling efforts done by Uginé in the HM and for U.S. CEP sales, while in fact strategic planning and marketing and customer sales contacts are largely performed by Usinor Stainless USA and Hague for U.S. CEP sales. Thus, the Department should continue to apply the CEP offset to adjust for the difference between LOTs in the HM and U.S. market.

Department's Position: We agree with Uginé. We found in the Preliminary Results that Uginé's HM sales were made at a more advanced LOT than its U.S. sales.¹³ We based this finding on an examination of the selling activities associated with each channel of distribution. Id. We disagree with Petitioners that we considered only indirect selling activities in conducting our LOT analysis. As discussed in the LOT Memo, we examined Uginé's selling activities and functions for its U.S. sales including "scheduling production and delivery." Id. at 6. Furthermore, we gave no indication in the LOT Memo that our finding of differences in LOT was based on an analysis of Uginé's U.S. selling activities compared to the U.S. selling activities of its affiliates as alleged by Petitioners. Our finding of a difference in LOTs between the HM and U.S. market is based on an examination of Uginé's selling activities and functions associated with each market. While we also listed selling activities and functions performed by Uginé's U.S. affiliates, Usinor Stainless USA and Hague, in the LOT Memo, this demonstrated that Uginé's U.S. affiliates were performing several of the same selling activities and functions Uginé performed in the HM, rather than Uginé. Thus, since Uginé's U.S. affiliates are performing these selling activities and functions and not Uginé for its U.S. sales, this further supports our finding that Uginé performs fewer selling activities and functions for its U.S. sales.

We also agree with Uginé that its table included in Appendices A-4-A and A-4-B of Uginé's October 7, 2002 Section A response, demonstrates that fewer selling activities are performed and a lower degree of selling activity is undertaken at the U.S. LOT. Furthermore, we verified Uginé's reported selling activities and functions. See Home Market Verification Report, at 19-20 and Exhibit 14. Therefore, we continued to find that Uginé's LOT for HM sales is as at a more advanced level than its LOT for U.S. CEP sales, in accordance with 19 C.F.R. 351.412(f)(1)(ii).

¹³ See Memorandum from Eugene Degnan, Case Analyst, to the File through James C. Doyle, Program Manager, Third Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from France: Level of Trade Analysis, dated July 31, 2003 ("LOT Memo") at 11.

We also continued to find that a CEP offset is warranted. We stated in the LOT Memo, that “{b}ecause we were unable to quantify the LOT adjustment in accordance with section 773(a)(7)(A) of the Act, as we found that the LOT in the HM matched the LOT of the CEP transactions, accordingly, we did not calculate a LOT adjustment. However, we applied a CEP offset to the NV-CEP comparisons.” See LOT Memo at 11. Thus, we continued to apply a CEP offset for the final results.

13. Negative Dumping Margins

Ugine contends that negative dumping margins should not be “zeroed” for purposes of calculating its dumping margin.¹⁴ Ugine attests that reviewing courts have ruled that the Department’s practice of “zeroing,” while longstanding, is not required by law, citing Bowe Passat Reinigungs-und Waschereitechnik GMBH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) and Serampore Indus. PVT, Ltd. v. United States, 675 F. Supp. 1354, 1360-61 (CIT 1987). Ugine argues that while reviewing courts have left the matter to the Department’s discretion, its practice is difficult to reconcile with the Department’s obligation to calculate the fairest, most accurate margin possible, citing Viraj Group v. United States, 193 F. Supp. 2d 1331, 1336 (CIT 2001) citing Rhone-Polenc, Inc. v. United States, 899 F. 2d. 1185, 1199 (Fed. Cir. 1990). Ugine contends that the WTO Appellate Body recently ruled that “zeroing” is inconsistent with the international obligations of the Uruguay Round Antidumping Agreement (“URAA”), citing Bed Linen from India, where the Appellate Body states,

By “zeroing” the negative dumping margins, the European Communities { } did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where “negative dumping margins” were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping.... Furthermore, we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of “zeroing” at issue in this dispute – is not a “fair comparison” between export price and normal value, as required by Article 2.4 and Article 2.4.2. See Report of the Appellate Body: European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) at 16 (“Bed Linen from India”).

Ugine argues that since this report has been approved by the WTO Dispute Settlement Body, it is clear that the URAA does not permit its signatories to use the practice of “zeroing” in calculating dumping margins. Ugine also contends that the Federal Circuit has noted that the United States, as a signatory,

¹⁴ Ugine is referring to “zeroing” as the Department’s treatment of transactions with U.S. price above normal value, or negative margins, as zero margins in the antidumping duty calculation.

has assumed obligations under the URAA. See Federal Mogul Corp. V. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

Ugine states that one of the principles of U.S. law is that U.S. statutes should be interpreted, whenever possible, to be consistent with international law. Ugine notes that U.S. courts routinely rely on this principle in interpreting U.S. statutes and it is equally applicable to federal agencies. See Weinerberg v. Rossi, 465 U.S. 25, 31, 1982, quoting Schooner Charming Betsy, 2. L. Ed. at 208, Ma v. Reno, 203 F. 3d 815, 829 (9th Cir. 2000), George E. Warren Corp. v. United States Environmental Protection Agency, 159 F. 3d 616, 624 (D.C. Cir. 1998). According to Ugine, the Department should, therefore, bring its calculations into line with the requirements of international law, as expressed by the WTO's dispute settlement bodies, and discontinue its practice of "zeroing" negative margins for purposes of calculating the dumping margin for Ugine in this review.

Petitioners contend that the Department should continue to calculate the overall dumping margin by assigning a zero percent margin to U.S. sales made at or above normal value. Petitioners argue that nothing in the Department's practice is inconsistent with the WTO Appellate Body ruling in Bed Linen from India cited by Ugine. Petitioners claim that every time the issue has been raised since the ruling, including the last review of this proceeding, the Department has properly rejected the arguments and retained its practice of zeroing.¹⁵ Petitioners contend that nothing in the law or the Court's treatment of this issue since the last review of this proceeding would warrant a different result. Petitioners argue that the Court of International Trade has consistently upheld the Department's practice of zeroing.¹⁶ Petitioners refute Ugine's contention that the Department should discontinue zeroing to conform to international obligations. Petitioners argue that the Court noted in Corus Staal that WTO decisions are

¹⁵ See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Germany ("Wire Rod from Germany") 67 FR 55802 (August 30, 2002) and accompanying Issues and Decision Memorandum, at Comment 10; Stainless Steel Wire Rod from India: Final Results of Antidumping Duty Administrative Review, 67 FR 37391, 37392 (May 29, 2002) and accompanying Issues and Decision Memorandum, at Comment 5; Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain, 67 FR 35482, 35484 (May 20, 2002) and accompanying, Issues and Decision Memorandum, at Comment 15; and SSSS from France, 2nd Review, at Comment 1.

¹⁶ See Corus Engineering Steels Ltd. v. United States, Slip Op. 03-110 at 18 (CIT August 27, 2003); PAM, S.p.A. v. U.S. Department of Commerce, Slip Op. 03-48 (CIT May 8, 2003); Corus Staal BV v. U.S. Department of Commerce, Slip Op. 03-25 (CIT March 7, 2003) ("Corus Staal"); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 20 CIT 558, 572, 926 F. Supp. 1138, 1150 (1996), remanded, 20 CIT 1426, 951 F. Supp. 231 (1996), affirmed, 21 CIT 604, 980 F. Supp. 1262 (1997); and Serampore Indus. Pvt. v. U.S. Department of Commerce, 11 CIT 866, 873-74, 675 F. Supp. 1354, 1360-61 (1987), affirmed upon remand, 12 CIT 825, 830, 696 F. Supp. 665, 670 (1998).

not binding on the Department, U.S. courts, or the WTO itself, and the URAA does not clearly prohibit zeroing. See Corus Staal, at 16 and 18. Petitioners contend that the Court also found in Corus Staal that the Department's interpretation of the statute was not unreasonable, given an ambiguous international agreement. Id., at 19. Thus, Petitioners argue that the Department has consistently applied the practice of zeroing in administrative reviews, has defended that practice before the Court of International Trade, and has been upheld in every instance. Therefore, the Department should continue to "zero" negative margins for purposes of calculating the dumping margin for Uguine in this review.

Department's Position: We agree with Petitioners. The Department's methodology is required by U.S. law. Section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate export prices and constructed export prices of such exporter or producer." Taken together, these sections direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Canada, 67 FR 55782 (August 30, 2002) ("Wire Rod from Canada") and accompanying Issues and Decision Memorandum, at Comment 1.

In addition, the directive to determine aggregate dumping margins in Section 771(35)(B) makes clear that the singular dumping margin in Section 771(35)(B) applies on a comparison-specific level, and does not itself apply on an aggregate basis. At no stage in this process is the amount by which export price or constructed export price exceeds normal value on non-dumped sales permitted to cancel out the dumping margins found on other sales. See Wire Rod from Germany at Comment 10. This does not mean, however, that non-dumped sales are ignored in calculating the weighted-average rate. The weighted-average margin will reflect any "non-dumped" merchandise examined, and the value of such sales is included in the denominator of the dumping rate while no dumping amount for "non-dumped" merchandise is included in the numerator. Thus, a greater amount of "non-dumped" merchandise results in a lower weighted-average margin. See Notice of Final Determination of Sales at Less Than Fair Value; Certain Cold-Rolled Carbon Steel Flat Products from France and accompanying Issues and Decision Memorandum 67 FR 62114 at Comment 21.

As the Department has discussed in prior cases, including the most recently completed review of this order, its methodology is consistent with its statutory obligations under Section 771(35)(B) of the Act. See SSSS from France, 2nd Review, at Comment 1. Regarding Uguine's argument that the WTO Appellate Body recently ruled that the Department's practice of zeroing is inconsistent with the international obligations of the URAA, as noted by Petitioners, the Court determined in Corus Staal that WTO decisions are not binding on the Department, U.S. courts, or the WTO itself, and the URAA does not clearly prohibit zeroing. See Corus Staal at 16, 18. The Court also found in Corus Staal that it "cannot find that zeroing is an unreasonable application of the statute as

it is presently written.” See Corus Staal at 19. Therefore, we continue to calculate the overall weighted average margin by including no dumping margins for Uginé’s non-dumped sales.

14. Home Market Warranty Expenses

Uginé contends that the Department double-counted HM warranty expenses in its preliminary calculation of the total cost of production for the below-cost test, and this overstated the cost of production. Uginé contends that in the Department’s preliminary results, the variable WARRH was included in the formula for calculating SELLCOP and was also incorporated into the variable DSELH, which was part of the formula for calculating SELLCOP. Therefore, when SELLCOP was included in the formula for calculating TOTCOP, it resulted in the double-counting of warranty expenses. Uginé argues that the Department should revise its model match program to eliminate this double-counting, and proposes the following revised programming language to replace the code in line 1255 of the preliminary results model match program:

$$\text{TOTCOP} = \text{COMMISH} + \text{RCOP} + \text{DSELCOP} + \text{ISELCOP} + \text{PACKINGH};$$

Petitioners contend that the SAS programming issues raised by Uginé are subsidiary to larger issues, and are largely irrelevant if the Department bases its final results on adverse facts available, as discussed in Petitioners’ case brief. Petitioners argue that Uginé has provided an unusable U.S. sales data base, an incomplete U.S. sales data base, and an unreliable, inaccurate HM data base, and has also failed to provide an appropriate date of sale analysis, as discussed in Petitioners’ case brief.

Department’s Position: We agree with Uginé. Regarding Petitioners’ allegations that Uginé provided unusable, inaccurate U.S. and HM data bases, and failed to provide an appropriate date of sale analysis: we have addressed these contentions and rejected them. See Comments 1 and 2 supra, at 2-13.

Therefore, to eliminate double-counting HM warranty expenses, we replaced SELLCOP with DSELCOP + ISELCOP in line 1255 of the model match program:

$$\text{TOTCOP} = \text{COMMISH} + \text{RCOP} + \text{DSELCOP} + \text{ISELCOP} + \text{PACKINGH};$$

15. Interest Expenses

Uginé contends that the Department’s calculation of the total cost of production for the below-cost test included imputed interest expenses in addition to actual interest expenses, which overstated the cost of production. Uginé argues that the Department should revise its model match program to include only the actual interest expenses, and proposes the following revised programming language to replace the code in line 1255 of the preliminary results model match program:

$$\text{TOTCOP} = \text{COMMISH} + \text{RCOP} + \text{DSELCOP} + \text{ISELCOP} + \text{PACKINGH};$$

As above, Petitioners contend that the SAS programming issues raised by Ugene are subsidiary to larger issues, and are largely irrelevant if the Department bases its final results on adverse facts available, as discussed in Petitioners' case brief. Petitioners argue that Ugene has provided an unusable U.S. sales data base, an incomplete U.S. sales data base, and an unreliable, inaccurate HM data base, and has also failed to provide an appropriate date of sale analysis, as discussed in Petitioners' case brief.

Department's Position: We agree with Ugene. Regarding Petitioners' allegations that Ugene provided unusable, inaccurate U.S. and HM data bases, and failed to provide an appropriate date of sale analysis: we have addressed these contentions and rejected them. See id.

Therefore, to remove imputed credit expenses from the calculation of total costs of production, we replaced SELLCOP with DSELCOP + ISELCOP in line 1255 of the model match program:

$$\text{TOTCOP} = \text{COMMISH} + \text{RCOP} + \text{DSELCOP} + \text{ISELCOP} + \text{PACKINGH};$$

16. Commission Expenses in Arm's-Length Test

Ugene contends that while the Department's practice is to deduct all direct selling expenses in calculating the net price used in the arm's-length test, the Department's preliminary model match program did not subtract commission expenses, which overstated the net price used in the arm's-length test. Ugene argues that the Department should revise its model match program, and proposes the following revised programming language to replace the code in lines 966 and 967 of the preliminary results model match program:

$$\text{ARM_NETPRIH} = (\text{GRSUPRH} + \text{SURCHGH} + \text{FRTREVVH} + \text{INTREVVH} + \text{BILLADJH}) - \text{COMMISH} - \text{DSELH} - \text{DISCREBH} - \text{MOVEH} - \text{PACKINGH};$$

As noted above, Petitioners contend that the SAS programming issues raised by Ugene are subsidiary to larger issues, and are largely irrelevant if the Department bases its final results on adverse facts available, as discussed in Petitioners' case brief. Petitioners argue that Ugene has provided an unusable U.S. sales data base, an incomplete U.S. sales data base, and an unreliable, inaccurate HM data base, and has also failed to provide an appropriate date of sale analysis, as discussed in Petitioners' case brief. Regarding commission expenses, in particular, Petitioners contend that the commissions were paid to an affiliated party, UFS, and Ugene has not demonstrated that the payments were made at arm's-length. Petitioners note that, as argued in their case brief, the Department's policy is not to adjust the gross unit price downward for the claimed affiliated-party expense if the respondent does not demonstrate that payments were made at arm's-length.

Department's Position: We agree with Ugene. Regarding Petitioners' allegations that Ugene provided unusable, inaccurate U.S. and HM data bases, and failed to provide an appropriate date of sale analysis: we have addressed these contentions and rejected them. See id. As well, we have addressed the Petitioner's allegation regarding commission expenses, and rejected that argument. See Comment 9, supra, at 21.

Therefore, we deducted commission expenses from the net price in the model match program to correct this inadvertent error as follows:

ARM_NETPRIH = (GRSUPRH + SURCHGH + FRTREVVH + INTREVVH + BILLADJH) -
COMMISH - DSELH - DISCREBH - MOVEH - PACKINGH;

17. Home Market Commissions

Ugene contends that the Department's preliminary calculation used expenses from U.S. business activities to offset HM commissions when the commission amount on the matched U.S. sale was zero. Ugene argues that the Department's practice is to offset HM commissions with the indirect selling expense (DINDIRSU) and inventory carrying cost (DINVCARU) incurred in the country of exportation on U.S. sales. Ugene contends that expenses from U.S. business activities should not be used to offset HM commissions, because U.S. prices have already been reduced by the full amount of these expenses. Ugene proposes the following revised programming language to replace the code in line 3494 of the margin calculation program:

OFFSETU = MIN(COMDOL, DINDIRSU + DINVCARU*EUROEXRATE);

Petitioners contend that the SAS programming issues raised by Ugene are subsidiary to larger issues, and are largely irrelevant if the Department bases its final results on adverse facts available, as discussed in Petitioners' case brief. Petitioners argue that Ugene has provided an unusable U.S. sales data base, an incomplete U.S. sales data base, and an unreliable, inaccurate HM data base, and has also failed to provide an appropriate date of sale analysis, as discussed in Petitioners' case brief. Regarding the Department's treatment of U.S. inventory carrying costs incurred in France for U.S. sales, Petitioners contend that Ugene has ignored the fact that its calculation of such U.S. inventory carrying costs is incorrect, for reasons discussed in Petitioners' case brief. Petitioners argue that the Department should treat the adjustments in the manner discussed in their case brief.

Department's Position: We agree with Ugene. Regarding Petitioners' allegations that Ugene provided unusable, inaccurate U.S. and HM data bases, and failed to provide an appropriate date of sale analysis: we have addressed these contentions and rejected them. See Comments 1 and 2, supra, at 2-13. As well, we have addressed the Petitioner's allegation that Ugene's calculation of U.S. inventory carrying costs is incorrect, and rejected that argument. See Comment 4, supra, at 15.

Therefore, we revised the offset for sales where the commission amount on the matched U.S. sale was zero to:

$$\text{OFFSETU} = \text{MIN}(\text{COMDOL}, \text{DINDIRSU} + \text{DINVCARU} * \text{EUROEXRATE});$$

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the model match and margin calculation programs accordingly. If accepted, we will publish the final results of this review and the final-weighted average dumping margins for the review firms in the Federal Register.

AGREE_____ DISAGREE_____

James J. Jochum
Assistant Secretary
for Import Administration

Date